THE DEVELOPMENT OF INTERNATIONAL LAW BY THE SECOND HAGUE CONFERENCE.

The second Hague Conference, which met from June 15 to October 18, 1907, differed in many respects from its predecessor of 1899. The first Conference is generally referred to as the "Peace Conference," but it is doubtful if the second will ever be so designated. In fact, not a few believe that instead of advancing, it has hindered the interests of peace by bringing new jealousies and rivalries to light and old ones into play; that instead of brotherly love, there was national hatred; instead of mutual accommodation, a tricky playing for position in the diplomatic race for power, and instead of an earnest desire for peace, a fixed determination not to be drawn into anything that would hinder the freedom either of preparation for, or action in, the grand clash of arms that is so generally anticipated.[1] This is doubtless due to the reaction that followed close upon the heels of the unwarranted hopefulness that preceded the assembling of the delegates. In striking contrast to its tone of eight years ago, the public evinced an attitude of almost universal optimism toward the Conference just closed.[2] Scarcely any project was too wild to find supporters who cherished hopes for its adoption.

The important question of the limitation of armaments found no place in the official programme[3] and that fact in itself may account, in part, for the changed tone with reference to the second Conference. The mere fact that disarmament had been included as one of the principal objects of the first Conference was sufficient to excite the scoffer and the skeptic; its exclusion from the second gave rise to the hope that men and nations had profited by experience and were willing to content themselves with more moderate aims than the peace of the world by mutual agreement. The first Conference had been able to accomplish nothing toward the disarmament of the nations beyond the expression of a "pious wish" that the subject might be taken up for consideration at some future

[1] See the current issues of the newspapers and magazines. The London Times, Weekly Ed., Oct. 25, 1907, is especially caustic.

[2] Holls, The Peace Conference at The Hague, Preface, p. vii; and The Independent, Oct. 31, 1907.

[3] Revue Générale de Droit International Public, T. xiii (1906), Documents, p. 12.

time; a similar wish is likewise the sum of accomplishment in this particular by the second Conference.[4]

The success of the first Conference has been found to lie in its more moderate efforts; the Court of Arbitration, though confessedly imperfect, has nevertheless performed its functions in a satisfactory manner on more than one occasion, and the Committee of Inquiry did good service at the time of the critical relations between England and Russia as a result of the North Sea incident. The adoption, moreover, in 1899 of a convention with respect to the Laws and Customs of War on Land, and another adapting the principles of the Geneva Convention of 1864 to maritime warfare, did much to mitigate the severities of war both on land and on sea. From the standpoint of the science of international law the conventions of the first Hague Conference marked the greatest single advance in its history through legislation. The majority of international law is customary law and it is only in very recent years that rules regulating the relations of nations have been adopted by express agreement. A large part of the law thus codified in 1899 had been previously practiced by the nations, but it was a distinct advance to have these practices codified, to have them formulated into concrete rules to which the nations gave their express consent. The setting of rules in this fashion is the only possible means of legislation in this sphere so long as international law rests on its present foundation of mutually independent states. Equality will not suffer legislation by a superior, so that legislation by agreement must remain the goal of international law. The work of the second Hague Conference marks an even further advance on the road toward international legislation by agreement. Many of the conventions of the first Conference have been revised and subjected to further elaboration and new ones have been adopted.

Before entering upon a detailed discussion of these conventions, it may be well to look briefly at some of the things the Conference did not do, for thus we shall be able to see why there is such universal disappointment with regard to the outcome. What was not done comprised so many important schemes that the failure to attain them has cast a shadow over the more modest but very solid results actually accomplished.

[4] Revue de Droit International et de Législation Comparée. Deuxième Série. T. ix, No. 6 (1er fascicule) (1907). Acte Final de la Deuxième Conférence Internationale de la Paix, p. 613. References to this publication will be made by the designation Revue.

The Court of Arbitration established by the first Hague Conference had two weaknesses. In the first place, the court was no court. That is, it was merely a number of distinguished jurists residing in various parts of the world who might be called upon to act as members of a board of arbitration. To be sure, when thus called upon, they were to meet in The Hague, to constitute themselves into a court and to make use of a procedure likewise provided by the convention. But the court was without real permanency of organization or location. Again, the use that was to be made of it was wholly optional in character; every feature of compulsion was lacking in its makeup; it had no jurisdiction except as states might agree to submit to its decisions.[5]

The United States and Great Britain sought to remedy these evils, the former by proposing the establishment of a permanent Court at the Hague with a local habitation and a name, a Court of Arbitral Justice; the latter by advocating the adoption of compulsory arbitration, at least in respect of conventional difficulties. The Conference contented itself, so far as the British proposal was concerned, with a declaration that the powers unanimously recognize the principle of obligatory arbitration, and that certain differences, especially those regarding the interpretation and application of conventional clauses, are susceptible of being submitted to obligatory arbitration. The declaration further set forth that, though it had been impossible to conclude a convention to this effect, the divergence of opinion had not passed the limits of a juridical controversy.[6] Germany was the leader of the successful opposition, which preferred to leave the matter for settlement by individual arrangements, largely because of the difficulty of agreeing upon the list of items to be arbitrated.[7]

The Court of Arbitral Justice, which the Hon. Joseph H. Choate, the head of the American delegation, advocated with so much zeal, was also interred among the "pious wishes," [8] with the recommendation to the signatory powers of the adoption of a subjoined project for the establishment of a Court of Arbitral Justice and its institution as soon as an agreement upon the choice

[5] Text of The Hague Conventions, 1899. Convention for the Pacific Settlement of International Disputes, Title iv, On International Arbitration, Art. 15 ff.

[6] Revue, p. 613.

[7] The Fortnightly Review, Oct. 1907; The Second Hague Conference, by Sir Thomas Barclay.

[8] Revue, p. 613.

of judges and the constitution of the court could be reached. The project was opposed by the smaller states, notably by the South American states, which were desirous of equal representation on the court.[9] Such a representation the larger states were unwilling to give, both because it would render the court cumbersome in number and because of the character of the membership that was to be anticipated from certain of these states. The project that was subjoined contains a very detailed statement of the proposed court in its organization, jurisdiction, and procedure, so that it would be a simple matter to put it into effect if once an agreement could be reached upon the disputed points.[10]

The Conference gave expression to three other *vœux*,[11] as follows: 1. That in case of war, the competent authorities, both civil and military, shall make it their special duty to assure and protect the maintenance of the pacific relations and particularly the commercial and industrial relations between the populations of the belligerent states and neutral countries. 2. That the powers regulate by special conventions the position, as respects military charges, of the aliens established in their territories. 3. That the elaboration of a convention relative to the laws and customs of maritime war should find a place in the programme of the next Conference, and that, in any case, the powers should apply, as far as possible, to naval warfare the principles of the convention relative to the laws and customs of war on land.

Finally the calling of a third Conference was recommended which should be held after an interval similar to that which has elapsed since the preceding Conference, at a date to be fixed by mutual agreement among the powers. Attention was also called to the need of preparing the work of this third Conference sufficiently far ahead to permit of the deliberations proceeding with authority and despatch. To attain this object the Conference deemed it very desirable that about two years before the probable date of meeting, a committee of preparation should be charged to receive the propositions to be submitted to the Conference, to sift out the material susceptible of immediate international regulation and to prepare a programme which the Governments might receive in time to be studied seriously in each country. The

[9] London Times, Weekly Ed., Oct. 18, 1907. The Contemporary Review, Dec. 1907; Impressions from The Hague, by W. T. Stead.

[10] Revue, p. 615 ff. [11] Revue, p. 614.

Conference suggested that the committee should be further charged with proposing a method of organization and procedure for the Conference itself. In view of the great waste of time occasioned by the absence of a proper preparation and of the inappropriate character of some of the subjects included in the Russian programme, this recommendation must be considered very timely and one which will doubtless be followed with respect to future Conferences.

For the purpose of facilitating the transaction of business the Conference appointed four main committees which were in turn divided into smaller committees for the consideration of special topics. The reports of the committees were submitted to the Conference in its plenary sittings, of which there were eleven in all, and the proposals adopted in these sessions constitute the conventions agreed upon as follows:[12]

1. The peaceful regulation of international conflicts.
2. The limitation of the employment of force for the collection of contractual debts.
3. Relative to the commencement of hostilities.
4. Concerning the laws and customs of war on land.
5. Concerning the rights and duties of neutral powers and persons in case of war on land.
6. Relative to the treatment of merchant vessels of the enemy at the outbreak of war.
7. Relative to the transformation of merchantmen into war-ships.
8. Relative to the laying of automatic submarine mines of contact.
9. Concerning bombardment by naval forces in time of war.
10. For the adaptation to maritime war of the principles of the Geneva Convention.
11. Limitations on the right of capture in a maritime war.
12. Relative to the establishment of an International Prize Court.
13. Concerning the rights and duties of neutral powers in a maritime war.
14. Declaration concerning the prohibition of hurling projectiles and explosives from balloons.

[12] Revue, p. 612. A summary of the work of the Conference may be found in Prof. Westlake's recent volume "War," being the second part of his International Law.

The first convention is a revision of the action of the Conference of 1899 in order "the better to assure the practical working of the Commission of Inquiry and the tribunals of arbitration, and to facilitate the recourse to arbitral justice when the subject of dispute is of a character to permit of a summary procedure." [13] No change was made in the articles relating to good offices and mediation, but those pertaining to the Commission of Inquiry have been increased from six to twenty-eight in number,[14] and at the suggestion of the United States the use of such a commission has been declared "desirable" as well as "useful." [15] The increase is due to the attempt to smooth the path of such commissions by settling in advance many questions of detail which might otherwise cause delay and annoyance, such as the place of meeting, which is to be The Hague when not otherwise stipulated, the language to be used, the time within which the parties shall set forth the facts, the method of forming the commission, the appointment of agents and counsel, the placing of the International Bureau of the Court of Arbitration at the service of commissions and a very elaborate procedure which is to be followed in the absence of a special stipulation to the contrary. The Commission of Inquiry is still limited to "the determination of the facts" and "has in no way the character of an arbitral award. It leaves the parties entire freedom as to the effect to be given to this determination." [16]

The revision of that part of the convention dealing with the Court of Arbitration was limited to a few matters of slight consequence; the two most important provide that in the model form of the Court "each party shall choose two arbiters, of whom only one may be a national or chosen from among those who have been designated by it as members of the permanent Court," [17] and that "in case of conflict between two powers, one of them may always address a note to the International Bureau containing a declaration that it is disposed to submit the difference to arbitration. The Bureau must, thereupon, immediately make known the declaration to the other party."

Numerous changes have been made in the procedure of the Court of Arbitration, all of which have the object in view of facilitating the "recourse to arbitral justice." An entirely new form of procedure was also introduced in certain cases under the

[13] Revue, p. 622. [14] Revue, p. 624 ff. [15] Art. 9.
[16] Art. 35. [17] Art. 45.

title of "Summary Procedure in Arbitration"; its application is restricted to cases of a nature suited to a summary form of procedure, and under the reservation of the eventual use of the more formal procedure. The Court in such a case is to be composed of three judges; each of the parties chooses one and these two a third; if they cannot agree, then each presents two names and from these four one is drawn by lot. The third judge presides. Each party is represented before the Court by an agent. The procedure is exclusively in writing, though witnesses may be called.[18]

A summary procedure such as this may serve a very useful purpose in cases which do not justify an elaborate adjudication, or which are of such slight consequence as not to warrant the expense attached to the use of the regular form of procedure, or which may arise where a small state is one of the parties and may not be able to afford a large expenditure.

The second convention, that concerning the employment of force for the collection of contractual debts, is the one new subject of consequence that has come within the view of compulsory arbitration. The collection of public debts by armed force has found its most frequent application against some of the more irresponsible and revolutionary South American states. In 1902 Great Britain and Germany united to press their claims, among them being public contractual debts, by force against Venezuela.[19] A blockade, at first pacific, later warlike, was instituted by these powers against certain Venezuelan ports. This action called forth a note from the Secretary of Foreign Affairs for The Argentine Republic, Dr. Luis M. Drago, to the United States, in which the action of the blockading powers was characterized as a violation of the Monroe Doctrine and the United States were called upon to join hands with the South American states to prevent the collection by force of public debts. The doctrine therein propounded soon came to be known as the "Drago Doctrine," and, at the Pan-American Congress held at Rio de Janeiro in the summer of 1906, the Drago Doctrine formed a subject of animated discussion. There was a desire in the Congress to secure the endorsement of this principle as a part of international law. In view of the evident impropriety of debtor nations seeming to prescribe to their creditors the means by which their debts could be collected, the

[18] Arts. 86 to 90.

[19] American Journal of International Law, July 1907; State Loans in their Relation to International Policy, by Luis M. Drago. Documents in "Papers Relating to the Foreign Relations of the U. S." 1903.

Pan-American Congress merely passed a resolution recommending to their several governments the propriety of presenting the subject to the Hague Conference.[20]

The subject was presented to the Conference on behalf of the United States by Gen. Horace Porter, but in a modified form that came to be known as the "Porter Proposition." In this shape it met the approval of the Conference, though it was far from satisfactory to the South American states, and was acceded to by many of them only with reservations.[21]

The "Porter Proposition," as incorporated in the convention, provides that "the contracting powers are agreed not to have recourse to armed force for the recovery of contractual debts claimed by the Government of one country from the Government of another as being due its nationals. Nevertheless this agreement will not be valid when the debtor state refuses or leaves without reply an offer of arbitration, or, in case of acceptance, renders impossible the conclusion of a protocol (*compromis*), or, after the arbitration, fails to comply with the judgment rendered." [22] The arbitration, furthermore, shall proceed in accordance with the regular procedure of the Court of Arbitration, and the tribunal shall, unless the contrary be provided, determine the justice of the demand, the amount of the debt, the time and the mode of payment.[23] Instead of prohibiting the employment of force under all circumstances for the collection of public debts, as the Drago Doctrine demanded, the use of force is merely postponed till arbitration has been tried. The absolute prohibition of the use of force would have given an opportunity to states with no conscience to violate their obligations with impunity, while the present convention would seem to afford abundant protection against the misuse of power by the large states.[24]

The third convention, relating to the commencement of hostilities provides:

> 1. That the contracting powers agree that hostilities shall not be commenced without a preliminary and non-equivocal notice, which shall have either the form of a

[20] American Political Science Review, Feb. 1907, p. 187; The Third International Conference of American States, by Paul S. Reinsch.

[21] London Times, Weekly Ed., Oct. 18, 1907. The North American Review, Dec. 1907; The Work of The Second Peace Conference, by M. W. Hazeltine.

[22] Art. 1. [23] Art. 2.

[24] Review of Reviews, Dec. 1907; The Net Result at The Hague, by Dr. David Jayne Hill.

declaration of war, stating the grounds (*motivé*), or of an ultimatum with a conditional declaration of war.[25]

2. That a state of war shall be notified without delay to the neutral powers, and shall only produce an effect in regard to them after the receipt of a notification which may be given even by telegraph. It is moreover agreed that neutral powers may not set up absence of notification if it be shown that, undoubtedly and in fact, they were aware of the state of war.[26]

The impetus to this convention was doubtless the way in which the Russo-Japanese war began. It will be remembered that two days after the rupture of diplomatic relations, the Japanese suddenly began the war by an attack upon the Russian vessels in the harbor of Chemulpo. The Russians protested vigorously against the action of Japan, which was characterized as "bad faith" and "treachery,"[27] but the Russian protest lost much of its force in face of the fact that most of the wars of modern times have been begun without previous notification, and that the Russians themselves have by no means been consistent in their own practice.[28] The action of the Japanese, however, aroused a great deal of discussion, out of which grew the demand for a provision similar to that adopted. It is extremely doubtful whether such a convention as this will furnish any protection against trickery and bad faith; there is no stipulation regarding the length of time that must elapse between the declaration of war and the opening of hostilities so that it is still possible for them to be simultaneous, particularly as the declaration may be made by telegraph.

The second article, providing for the notification of neutrals, will serve the useful purpose of removing the uncertainty so often attaching to the precise moment at which war began and also enable the neutral the better to perform its duties and maintain its rights.[29]

The fourth convention is a revision of the convention of the first Hague Conference concerning the laws and customs of war

[25] Art. 1. [26] Art. 2.

[27] Hershey, International Law and Diplomacy of the Russo-Japanese War, p. 62 ff.

[28] Ernest Nys, La Guerre et la Déclaration de la Guerre, Quelques Notes. Revue de Droit International et de Législation Comparée. Deuxième Série. T. vii, p. 517 ff. M. H. Nagaoka, La Guerre Russo-Japonaise et le Droit International. Revue de Droit, etc., T. vi, p. 461 ff.

[29] The Fortnightly Review, Oct. 1907; The Second Hague Conference, by Sir Thomas Barclay.

on land, and was undertaken, as the preamble recites, from the desire to lessen the evils of war so far as military necessity will permit. Furthermore, it is declared to be the intention of the contracting parties, that, as it is impossible to elaborate stipulations for all circumstances, in those cases where no regulations have been adopted they shall consider themselves bound by the principles of international law as established by the usages among nations, by the laws of humanity and the exigencies of the public conscience.

Only one change is made in the convention proper as distinguished from the regulations themselves; this is an addition to the effect that the belligerent who violates the provisions of the regulations shall be held for an indemnity, and shall be responsible for all violations committed by persons forming a part of its armed forces.[30] With few exceptions the changes made in the regulations were merely verbal, and two of them alone deserve mention. The first is an additional limitation placed upon the means of injuring an enemy, and forbids a belligerent to declare the rights or actions of the citizens of the opposing belligerent to be extinguished, suspended or not recoverable at law.[31] The second deals with the things an occupying enemy may seize, and is interesting from its very general character and from the indication it gives of the possibilities of future means of transportation; the addition in question declares that all means, whether upon the land, the sea or in the air, for the transmission of news or the transportation of persons or things shall be liable to seizure even if they belong to private persons, but they must be restored and the indemnity regulated at the conclusion of peace.[32] In connection with the rights of an occupying force it may be noted that submarine cables are not liable to seizure or destruction except in case of absolute necessity and they must be restored and an indemnity determined upon the recurrence of peace.[33]

The fifth convention concerns the rights and duties of neutral powers and persons in case of war on land, and is partly new and partly old. The old material consists of those regulations, included by the first Conference among the laws and customs of war on land, which deal with the belligerents interned and the wounded cared for by the neutral,[34] and with the treatment of railroads;[35] the new material treats of the rights and duties of neutral powers and persons.[36]

[30] Art. 3. [31] Art. 23 (1). [32] Art. 53. [33] Art. 54.
[34] Arts. 11 to 15. [35] Art. 19. [36] Arts. 1 to 10.

While the action of the conference with respect to the position of neutrals is extremely limited in scope, it may nevertheless be regarded as a step calculated to result in giving definiteness to all the rights and duties of neutrals within a very much shorter time than would otherwise have been possible. It may seem the veriest commonplace to announce in solemn form that "the territory of neutral powers is inviolable"; "that it is forbidden to belligerents to march troops or send convoys, whether of munitions or of provisions, through the territory of a neutral power,"[37] and "that corps of combatants may not be formed, nor bureaux of enrollment opened upon the territory of a neutral power for the profit of the belligerents."[38] These are things, to be sure, which it has long been agreed no neutral state can permit and not be guilty of a violation of its neutral duties, and no belligerent do without infringing upon the rights of neutrals. Jefferson, when Secretary of State, gave expression, in classic form, to the duty of a neutral when he said "that if the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right."[39] Since that time there has been a general recognition of the active nature of neutral duty and of the obligation resting upon a neutral to forbid the acts above mentioned, which are now included in the convention. Though the mere adoption of a convention containing nothing new would not have been without value, there were, further, certain new provisions included which undoubtedly had their origin in the recent war between Japan and Russia. Belligerents are forbidden to "install on the territory of a neutral power a radio-telegraphic station or any apparatus intended to serve as a means of communication with the belligerent forces on land or sea," or "to utilize an installation of this kind established by them before the war upon the territory of a neutral power with an exclusively military purpose, and which is not opened to the use of the public."[40] A neutral power, however, is not bound to forbid or to hinder the use by belligerents of the telephone or telegraph cables or wireless apparatus which belong either to the state or to companies or to individuals, but restrictions placed upon the use of these materials must apply equally to both.[41] The motive for these provisions lay in the action of Russia in establishing a wireless

[37] Art. 2. [38] Art. 4.

[39] Moore, International Law Digest, vii, p. 881.

[40] Art. 3. [41] Arts. 8 and 9.

station at Che-Foo, on Chinese territory, by means of which communication with Port Arthur was sought. Despite the protest of Japan, the station was allowed to stand for some weeks before the Chinese authorities finally destroyed it.[42]

Another and more important question relating to the use of wireless telegraphy likewise arose during this war. A vessel fitted out with a wireless apparatus was chartered by the New York and the London *Times,* and the correspondent felt himself to be in a more or less dangerous position when he was threatened with death as a spy by the Russians, and warned off neutral waters and even off the high seas by Japan.[43] The Russian threat was, of course, absurd and in direct violation of the first Hague convention defining spies.[44] The Japanese attitude, however, raises the interesting question as to how such vessels shall be treated. War correspondents have hitherto been permitted to accompany armies in the field and send out reports, since the reports are under the censorship of the commander, who can thus prevent news, which he deems might be disadvantageous, from reaching the enemy through this source. The position of correspondents was regulated by the first Hague Conference, which provided that, when captured, they should be treated as prisoners of war if provided with a permit from the military authority of the army which they accompany, and this regulation was retained in the convention of the second Conference.[45] It is well known that the Japanese exercised a very stringent control over war correspondents and kept most of them cooling their heels in Tokio. Under such conditions correspondents can be made innocuous, but the case is far different when you have a vessel on the high seas so equipped as to be in constant communication with neutral territory though a thousand miles away. The possibilities of injury to the belligerent fleet through the exposure of its condition or position by wireless from such a vessel, though done through the ordinary news channels, are so great that no belligerent would feel inclined to permit it.

[42] Lawrence, War and Neutrality in the Far East (2nd ed.), pp. 218-220. Hershey, International Law and Diplomacy of the Russo-Japanese War, p. 122, note 15.

[43] Lawrence, War and Neutrality in the Far East, p. 83 ff. Hershey, International Law and Diplomacy of the Russo-Japanese War, p. 118, note 6.

[44] Regulations respecting the Laws and Customs of War on Land, arts. 29-31, in the convention of both the first and second Hague Conferences.

[45] Art. 13.

It would be unreasonable to find fault with the Conference for not adopting sufficient regulations to avoid all difficulties from this newest and most astounding means of communication. We ought to realize that here is a very important question; the conflicting rights and interests of belligerents and neutrals have touched at a new point and it is yet to be determined which shall prevail.

Article 7 of this same convention seems to settle definitely the theoretical question of the legality of contraband trading, since it provides that a neutral power is not bound to prevent the exportation or transit, for the benefit of one or the other of the belligerents, of arms, munitions, and, in general, of anything that can be useful for an army or fleet.

Neutral persons are the nationals of a state that does not take part in a war.[46] Such a person forfeits his neutrality if he commits hostile acts against a belligerent, especially if he voluntarily takes service in the ranks of the armed forces of one of the parties, but in such a case he shall not be treated more rigorously by the belligerent against whom he has forfeited his neutrality than a citizen of the other belligerent.[47]

The sixth convention requires but a brief notice. It regulates the treatment of merchant vessels of the enemy at the outbreak of war. Such vessels when found in the enemy's ports or which come into them without knowledge of the hostilities, are to be permitted to depart freely, either at once or after a sufficient delay,[48] and enemy vessels found upon the high seas, which have quitted port before the outbreak of war and so are in ignorance of it, may not be confiscated, though they, with the enemy goods they carry, may be seized and held till the end of the war without indemnity, or they may be requisitioned or even destroyed upon condition that they be paid for.[49] This convention does not refer to merchant vessels, the construction of which indicates that they are intended to be transformed into war vessels.[50]

The seventh convention also refers to merchant vessels, and lays down certain conditions that must be fulfilled in transforming merchantmen into war vessels, but here as elsewhere the really important question failed of solution. It is of small consequence to agree that a vessel so transformed shall be officered and controlled by commissioned officers of the state whose flag it flies, that it shall bear the distinctive exterior signs of ships of war of its country, that its discipline shall be military, that it shall obey the

[46] Art. 6. [47] Art. 17. [48] Art. 1. [49] Arts. 3 and 4. [50] Art. 5.

laws and customs of war and that a note of the transformation shall be made by the belligerent in the list of its fleet vessels.[51] The important point, as was plainly evident in the case of the Russian vessels of the Volunteer Navy, was whether this change could be made upon the high seas.[52] The *Petersburg* and the *Smolensk,* belonging to the Russian Volunteer Fleet in the Black Sea, passed through the Bosporus and the Dardanelles as merchantmen and within a few days captured a British vessel, the *Malacca,* and held up a German mail steamer, the *Prince Heinrich,* in the Red Sea. In the face of the vigorous protests of both Great Britain and Germany the career of these vessels as belligerent cruisers was soon terminated, but the question of the legitimacy of the transformation upon the high seas from merchantmen to cruisers was left unsettled and no agreement with respect to it could be reached at The Hague. Neither the sixth nor the seventh convention was signed by the American delegation because they were considered more oppressive to the rights of private property than the present customary law.[53]

It would be a mistake to say that the eighth convention regulates the placing of submarine mines, if thereby it was meant to imply that anything like a complete regulation was attempted. A few rules, narrow in scope, were agreed to, which provide that floating mines shall become harmless within an hour after those who have placed them have lost control over them,[54] that anchored mines shall become harmless when they break their moorings and that mines shall not be placed along the coasts and ports of an enemy for the sole purpose of intercepting commercial navigation;[55] when anchored mines are used, every precaution must be taken for the security of neutral commerce, and these mines, so far as possible, must become harmless after a limited time, and notice of their location, as soon as military necessity permits, must be sent to the Governments.[56] These, with one or two other provisions looking to the protection of neutral commerce, constitute the convention. Great Britain was so much dissatisfied because the Conference would not agree to regulate the "location" of mines, and restrict their use to within the three-mile limit, that Sir Ernest Satow read

[51] Arts. 1 to 6.

[52] Lawrence, War and Neutrality in the Far East, p. 205 ff. Hershey, International Law and Diplomacy of the Russo-Japanese War, p. 138 ff.

[53] The Review of Reviews, Dec. 1907; The Net Result at The Hague, by Dr. David Jayne Hill.

[54] Art. 1. [55] Art. 2. [56] Art. 3.

a declaration on behalf of Great Britain, in the nature of a protest, in the course of which he stated that "as this convention constitutes only a partial and inadequate solution of the problem, it can not be regarded as a complete exposition of international law upon this subject. Accordingly it will not be permissible to presume the legitimacy of an action for the mere reason that this convention has not prohibited it."[57] There was a feeling in the Conference that Great Britain was upholding the principle of regulating the "location" of mines from the advantage it would bring her extensive commercial interests, while not preventing her powerful vessels from carrying on their destructive operations against the shore from beyond the three-mile limit. The naval and military representatives of the United States declared that this Government would never be willing to restrict in any way its freedom of action with respect to the defence of its coasts.[58]

The ninth convention is an attempt to realize the *vœu* expressed by the first Conference, concerning the bombardment, by naval forces, of ports, towns, and villages not defended. That Conference forbade the bombardment of undefended places in a war on land and the present Conference has done the same with respect to bombardment from the sea, and a place is not regarded as defended for the sole reason that its harbor has been mined.[59] Military works, however, and military and naval establishments, depots of arms or of war-material, manufactories and installations suitable for the use of the fleet or army of the enemy and the warships in the harbor are liable to be bombarded, but only in the case that the local authorities do not proceed to their destruction within the time fixed and in case it can not be done otherwise than by cannon.[60] Likewise such places may be bombarded, if, after express notification, the local authorities refuse to supply requisitions of food or supplies necessary for the immediate need of the naval force there present, provided they be in proportion to the resources of the place, and be demanded upon the authorization of the commander of the naval force; as far as possible they shall be paid for in cash; if not, then receipts must be given. No undefended place may be

[57] London Times, Weekly Ed., Oct. 4 and 11, 1907. The correspondent speaks of this convention as a "humiliating failure" to arrive at any reasonable regulations for diminishing the dangers to peaceful shipping. M. W. Hazeltine in the North American Review, Dec. 1907, thinks this convention is "stigmatized as the exhibition of a peculiarly nauseous type of hypocrisy" and "leaves untouched the liberty of indiscriminate devastation."

[58] The Navy, November 1907, p. 46. [59] Art. 1. [60] Art. 2.

bombarded for a refusal to pay contributions in money.[61] The same provisions as in other cases of bombardment were adopted for the protection of buildings devoted to art, science and philanthropy.[62]

The tenth convention is a revision of the convention of 1899 for the adaptation to maritime warfare of the principles of the Geneva Convention of 1864. Such a revision was necessary by reason of the revision of the Geneva Convention that was made in 1906. The present convention is appreciably more detailed than the one it superseded, and the elaboration looks chiefly to a better care of the sick and wounded who may be taken on board by hospital ships. Hospital ships, equipped in whole or in part by individuals or societies officially recognized by neutral countries, are to be respected and to be exempt from capture "on condition that they put themselves under the direction of one of the belligerents, with the previous consent of their own country and the authorization of the belligerent himself."[63] Under the convention of 1899 they were their own masters and operated independently of either belligerent, except for certain restrictions, considered necessary for the protection of the belligerents, which are still retained. Following the revised form of the Geneva Convention it is agreed that "the distinctive signs" of the vessels and of the personnel provided for in this convention "may not be employed, either in time of peace or of war, to protect or to mark vessels other than those here mentioned,[64] and the signatory powers agree to pass or to propose the measures necessary "to punish, as a usurpation of military standards" the misuse of these signs.

The tenth article of the convention of 1899 was excluded from all the ratifications, but reappears in the new convention.[65] It provides that the shipwrecked, wounded, or sick who are landed at a neutral port with the consent of the local authorities, must, failing a contrary arrangement between the neutral state and the belligerent, be guarded by the neutral state, so that they may not be again able to take part in the military operations. The expenses of entertainment and internment shall be borne by the state to which the shipwrecked, wounded, or sick belong.[66]

The eleventh convention places restrictions on the right of cap-

[61] Art. 4. [62] Art. 5. [63] Art. 3. [64] Art. 6.

[65] Sir Thomas Barclay, Problems of International Practice and Diplomacy, p. 247.

[66] Art. 15.

ture in a maritime war in respect to postal correspondence, to certain vessels and to the crews of merchant vessels. The growing importance of the mails and the advisability of an exceptional practice with regard to mail steamers have been subjects of frequent discussion by text writers since the civil war; the actual practice of the nations, too, has evidenced a tendency toward exemptions which have here been recognized. The mail, whether of neutrals or of belligerents, whether its character is official or private, found on the sea upon a neutral or belligerent vessel, is inviolable. If the vessel is seized, the mail is to be forwarded by the captor with the least possible delay. This freedom from seizure does not extend, however, to the mail upon vessels attempting to run a blockade, when such mail is destined to the blockaded port,[67] nor are neutral mail steamers freed from the ordinary laws of maritime war, but the right of visit is to be exercised only in case of necessity and with all the skill and speed possible.[68]

Boats devoted exclusively to coast-wise fishing or to insignificant local navigation, together with their equipment, and vessels of religious, scientific, or philanthropic missions, are free from capture, but this immunity is of course lost if they participate in any manner in hostilities.[69]

Upon the capture of an enemy merchantman, the members of the crew, citizens of a neutral state, may not be made prisoners of war, nor the captain and officers, upon their giving a formal promise in writing not to serve upon an enemy vessel during the continuance of the war.[70] A similar treatment is to be accorded to the officers and the crew, even though citizens of the enemy, upon a formal written promise not to perform any service, while hostilities last, having any connection with military operations.[71]

The twelfth convention concerns the establishment of an International Prize Court. The validity of a capture must be established before a court, first of the captor,[72] and eventually of the International Prize Court, under certain conditions of appeal,[73] which may be made by the neutral power, the neutral private person, or even the private individual belonging to the belligerent power, if the decision concerns goods carried by a neutral ship, or by an enemy ship which has been captured in the territorial waters of a neutral, when the capture has not been made the subject of diplomatic complaint, or when the capture is alleged to have been made

[67] Art. 1. [68] Art. 2. [69] Arts. 3 and 4. [70] Art. 5. [71] Art. 6.
[72] Art. 2. [73] Art. 3.

in violation of a conventional arrangement between the belligerents or of a legal provision of the belligerent captor. If the law to be applied has been agreed upon between the parties to the suit, then the stipulations of that convention are to be followed by the Court. In default of such stipulations, the Court shall apply the rules of international law. If generally recognized rules do not exist, the Court is to decide in accordance with the general principles of justice and equity; if the recourse is founded upon the violation of a legal provision imposed by the belligerent captor, the Court shall apply that provision, except in the case where it considers that the consequences are contrary to justice and equity.[74]

The law to be applied by the Court constituted one of the chief stumbling blocks in the way of its establishment. The difficulty lies in the difference between the law of prizes as administered by the English and by the American courts on the one hand, and the continental courts on the other, and it can not be regarded as an altogether satisfactory solution to leave the Court to act in accordance with the rules of international law—if there be any—and failing these, the principles of justice and equity.[75]

The judges are to be appointed by the contracting parties [76] for a period of six years;[77] they are equal in rank and take precedence in accordance with the date of the receipt of the notification of their nomination;[78] they enjoy the privileges and immunities of diplomats when in the performance of their duties outside their own country;[79] the number of judges is fifteen and nine constitute a quorum;[80] the judges appointed by the seven great powers are always called upon to serve, while those of the smaller states rotate according to an appended schedule;[81] they receive as remuneration a fixed sum for each day the court is in session and may not receive any remuneration from their own state or from any other as a member of the court.[82]

The procedure is elaborated in 23 articles and consists of two distinct parts, the written instruction and the oral debate.[83] The instruction consists in the deposit and exchange of all expositions and documents; every document produced by one party must be communicated in a certified copy to the other. Then follows a public oral debate upon the facts and the law.[84]

No part of international law has been less clearly determined

[74] Art. 7. [75] London Times, Weekly Ed., Oct. 4, 1907.
[76] Art. 10. [77] Art. 11. [78] Art. 12. [79] Art. 13. [80] Art. 14.
[81] Art. 15. [82] Art. 20. [83] Art. 34. [84] Art. 35.

than that dealing with the rights and duties of neutrals in case of a maritime war. It is much to be doubted whether all the regulations of the thirteenth convention will produce only good results. The delegates of the United States refused to sign it on the ground that it imposes upon neutrals obligations which it might be impossible for them to discharge.[85]

In addition to setting forth the reciprocal obligations of neutrals and belligerents about which there is no doubt, a start has been made toward a settlement of some of the most vexed questions of recent years, and it is interesting to observe that the "three rules" of the Treaty of Washington have found at least a partial recognition. A neutral may not allow its territory to be used as a base of naval operations,[86] nor may it, directly or indirectly, transfer to a belligerent vessels of war, munitions, or materials of war,[87] though it is not bound to prevent the exportation or transit of arms and munitions to the belligerents.[88] These constitute that class of obligations of a neutral state which Mr. Holland regards as involving *abstention.*[89] When we turn to that class of obligations which involves *prevention,* "imposing upon the neutral state duties of interference with the action of belligerents and of its own subjects,"[90] we pass from acts of a positive character and enter a field of debatable questions. "A neutral government is bound to use the means at its disposal to prevent, within its jurisdiction, the equipment or armament of any vessel which it has reasonable ground to believe is intended to cruise or to carry on hostile operations against a power with which it is at peace. It is also bound to use the same care to prevent the departure from its jurisdiction of any vessel intended to cruise or to carry on hostile operations, and which has been, within said jurisdiction, adapted wholly or in part for warlike use."[91]

Such a provision by no means settles all the difficulties involved in the responsibility of a neutral state with respect to the issuance from its territory of vessels of war which may be prepared by its citizens for belligerent use, but it at least brings uniformity of obli-

[85] Review of Reviews, Dec. 1907; The Net Result at The Hague, by Dr. David Jayne Hill. The London Times, Weekly Ed., Oct. 25, 1907, speaks of the "Convention skilfully framed to convert neutral ports into strategical bases for the convenience of belligerents who do not possess such bases of their own."

[86] Art. 5. [87] Art. 6. [88] Art. 7.

[89] T. E. Holland, Neutral Duties in a Maritime War, p. 2.

[90] T. E. Holland, Neutral Duties in a Maritime War, p. 3.

[91] Art. 8.

gation that is highly desirable. It still remains to be determined just what means a neutral must use to prevent its territory being improperly used or exactly what constitutes an improper use, but it would seem improbable that in the face of such a provision any state could or would suffer an open violation of its neutrality.

The two "twenty-four-hour rules" have also found a place in the convention. The first, which fixes the time a belligerent war vessel may remain in a neutral harbor, is made applicable only "in default of special regulations to the contrary by the neutral power," and in consequence leaves it still possible for a nation to continue the practice of allowing belligerent war vessels to remain an indefinite length of time within its waters.[92] The second of these rules is unequivocal in declaring that "when the war vessels of the two belligerents find themselves at the same time in a neutral port or road (*rade*), at least twenty-four hours must elapse between the departure of the vessel of one belligerent and the departure of the vessel of the other." The order of departure is determined by the order of arrival "except in the case where the first to arrive is allowed to prolong the time of its stay for special reasons." The same rule applies as between a neutral merchantman, and a belligerent war vessel.[93] The belligerent war vessel, furthermore, may not make use of neutral ports and roads to make repairs which would increase its military force,[94] or to renew or augment its military supplies or armament, or to increase its crew,[95] or to revictual except to the extent normally required in time of peace, or to take on more fuel than enough to reach the nearest home port, except in those countries which permit enough to fill their ordinary bunkers, or to take on fuel more than once in three months in the ports of the same neutral.[96]

Prizes may be brought into neutral ports only in case of necessity, and they must depart as soon as the cause which has justified their entry has ceased.[97] Furthermore, if a belligerent war vessel does not depart after notification by the neutral, it becomes the duty of the neutral to render the vessel incapable of going to sea during the war and to retain the officers and crew.[98]

The character and extent of the provisions referred to are sufficient to make it evident that not the least valuable part of the work of the Second Hague Conference is to be found in this last con-

[92] Art. 12. [93] Art. 16. [94] Art. 17. [95] Art. 18.
[96] Art. 30. [97] Art. 21. [98] Art. 24.

vention, and to justify to no small degree those who believe that the results of the Conference are quite sufficient to give it a *raison d'être.*

A declaration closes the final act of the Conference—henceforth "the contracting parties agree, for a period extending to the end of the Third Peace Conference, to prohibit the launching of projectiles and explosives from balloons or by other new methods of a similar nature."

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